STATE OF MICHIGAN

COURT OF APPEALS

LECHELLE M. BISHOP, Plaintiff-Appellee,	UNPUBLISHED October 24, 2013
v	No. 310636 Lenawee Circuit Court Family Division
PAUL C. BISHOP, Defendant-Appellant.	LC No. 11-036684-DM

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce awarding spousal support to plaintiff. We affirm.

A one-day divorce trial was conducted below, with the only issue of dispute being whether plaintiff was entitled to spousal support. The trial court awarded plaintiff spousal support, and the divorce judgment provided as follows regarding the support award:

> Commencing forthwith defendant shall pay through the office of the Lenawee County Friend of the Court [FOC], the sum of . . . $100 . . . per month in advance, until July 1, 2012. Commencing July 1, 2012, at which time child support terminates.[1] Defendant shall pay through the office of the [FOC], the sum of . . . $300 . . . per month in advance for alimony/spousal support for an indefinite period.

On appeal, defendant does not challenge the specific amount of support, but contends that the trial court erred in simply awarding any spousal support to plaintiff.

This Court reviews a trial court's spousal support award for an abuse of discretion. *Loutts v Loutts*, 298 Mich App 21, 25; 826 NW2d 152 (2012). "'An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes.'"

[1] The parties have one child who had just turned 18 years old.

Id. at 26 (citations omitted). A trial court's findings of fact related to an award of spousal support are reviewed for clear error. *Myland v Myland*, 290 Mich App 691, 694; 804 NW2d 124 (2010). "A reviewing court may determine a finding is clearly erroneous only when, on the basis of all the evidence, it is left with a definite and firm conviction that a mistake has been made." *Ewald v Ewald*, 292 Mich App 706, 723; 810 NW2d 396 (2011). The appellant bears the burden of showing that a mistake was made. *Id*. We give special deference to findings made by the trial court when they are based on witness credibility. *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the trial court's findings are not clearly erroneous, this Court must determine whether the dispositional ruling was fair and equitable under the circumstances of the case. *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008). "The trial court's dispositional ruling must be affirmed unless the appellate court is firmly convinced that it was inequitable." *Id*.

"A trial court has discretion to award spousal support under MCL 552.23." *Myland*, 290 Mich App at 695. "The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Berger*, 277 Mich App at 726. MCL 552.23(1) provides:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

With respect to factors subject to consideration when making a spousal support determination, this Court in *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003), set forth the following list:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity.

"'The trial court should make specific factual findings regarding the factors that are relevant to the particular case.'" *Loutts*, 298 Mich App at 32 (citation omitted).

Defendant's claim rests on his contention that the trial court erred in discrediting his testimony that he was no longer deployable in the Michigan National Guard after he sustained a

gunshot injury to his leg and was diagnosed with traumatic brain injury (TBI) and post-traumatic stress disorder (PTSD). In addition, defendant argues that his testimony established that he could not return to work as a carpenter due to his injuries. Nonetheless, the trial court made specific findings regarding defendant's credibility, stating:

> Defendant-husband indicates that he has -- believes he has [PTSD]. And although he says he's probably not military acceptable, he didn't say that with any certainty, nor did he say anything other than he's not deployable. He's receiving unemployment at this time resulting in a rather significant change in his income, but I have no reason to believe, even with the gunshot wound to his leg, that that is in fact a permanent condition that would impede his ability to work. And he has demonstrated a capacity to earn a much greater income than is represented by the child support at this time, which, as I understand it, will be reduced . . . to just under $300.

Defendant testified that he was no longer deployable and that the Michigan National Guard was "probably gonna med [him.]" Defendant points to the trial court's determination that defendant did not say with any "certainty" that he was no longer deployable, but this is merely an issue of credibility, rather than an issue of an improper burden of proof. This Court will not interfere with the trial court's determinations regarding credibility. See *Johnson*, 276 Mich App at 11.

Defendant attached to his brief on appeal, as he did with his motion for reconsideration in the trial court, a medical report by a nurse practitioner (NP) and argues that it corroborated his testimony that he was unable to work. The report noted the NP's opinion that defendant was "no longer capable of doing the physical activities [n]or does he meet the requirements of the military/carpenters union due to his physical/mental health problems." We first note that the medical report reflected that he was evaluated two months after the conclusion of the divorce trial and a couple of weeks after the judgment was entered, so the report is effectively irrelevant. We also note that the motion for reconsideration was filed under MCR 2.119(F), which pertains to "rehearing or reconsideration of [a] decision on a motion," and which requires a showing "that a different disposition of the motion" is necessary to correct an error. MCR 2.119(F)(1) and (3). Defendant was seeking relief *from a judgment*; therefore, MCR 2.612 was applicable. And the NP's report does not qualify as "[n]ewly discovered evidence," MCR 2.612(C)(1)(b), where defendant could have obtained a medical evaluation and report prior to trial. Even under MCR 2.119(F), a court does not abuse its discretion in denying a motion for reconsideration on the basis that the facts could have been presented "prior to the trial court's original order." *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). While the NP's particular report that postdated the trial and judgment was new and could not have been presented at trial, defendant, again, could have procured a timely medical examination and report and presented it at trial, but failed to do so.

Defendant also claims that plaintiff bore the burden of establishing that defendant had the ability to work, but presents no authority to support this position. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Therefore, the trial court did not err in concluding that the evidence failed to establish that defendant was unable to return to work.

Defendant further contends that the spousal support award was error because plaintiff had a higher gross monthly income. Defendant testified that his gross monthly income before he sustained the gunshot injury was $3,600 to $3,700 a month. The FOC initially issued a prognosticator report and recommended that defendant pay $315 a month to plaintiff for short-term spousal support, given that defendant's gross monthly income was $3,650 and plaintiff's gross monthly income was $1,792. A second report recommended that defendant pay $352 a month to plaintiff for short-term spousal support based on defendant's gross monthly income of $3,950 and plaintiff's gross monthly income of $1,818. A third report, issued after defendant sustained the gunshot wound and began collecting unemployment benefits, recommended that defendant pay no spousal support based on defendant's gross monthly income of $1,345 and plaintiff's gross monthly income of $1,813. As indicated earlier, in awarding spousal support, the trial court found:

> [Defendant's] receiving unemployment at this time resulting in a rather significant change in his income, but I have no reason to believe, even with the gunshot wound in his leg, that that is in fact a permanent condition that would impede his ability to work. And he has demonstrated a capacity to earn a much greater income than is represented by the child support at this time[.]"

Defendant argues that the trial court should have concurred with the FOC's third recommendation based on the most recent prognosticator report. However, it is ultimately the province of the trial court alone to decide whether to award spousal support and to decide the amount of the award; the trial court is not bound by the FOC's prognosticator's report. See *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989) ("While the trial court may consider the FOC report and recommendation, plaintiff is unable to direct our attention to any legal authority in support of the proposition that it must do so."). The trial court did not err in failing to rule consistent with the FOC's recommendation. Furthermore, in noting that defendant had demonstrated a capacity to earn a much greater income and that defendant's ability to work was not impeded, and given the consistency between the earlier FOC recommended award and the award entered by the court, it is evident that the trial court effectively imputed income to defendant in an amount comparable to his prior earnings. The court simply disbelieved defendant's testimony about his ability to work. "The voluntary reduction of income may be considered in determining the proper amount of alimony[,] [and] [i]f a court finds that a party has voluntarily reduced the party's income, the court may impute additional income in order to arrive at an appropriate alimony award." *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000). We conclude that the court's factual findings regarding defendant's ability to work and likelihood of earning the imputed income were sufficiently detailed and not clearly erroneous, especially considering that the issue related to a credibility assessment. *Clarke v Clarke*, 297 Mich App 172, 181; 823 NW2d 318 (2012).

Next, despite defendant's contention, the trial court was not required to articulate on the record its findings with regard to each spousal support factor. See *Loutts*, 298 Mich App at 32 (specific factual findings should be made regarding the factors that are relevant to a particular case). Moreover, the trial court touched on a number of the factors, e.g., the length of the

marriage, the parties' ages, the abilities of the parties to work and pay spousal support, the prior standard of living of the parties, and the health of the parties. *Olson*, 256 Mich App at 631. Reversal is unwarranted.

Defendant next argues that the trial court was prohibited from requiring defendant to pay spousal support from his unemployment benefits because they were absolutely inalienable under MCL 421.30. MCL 421.30 provides:

> All rights to benefits shall be absolutely inalienable by any assignment, sale, garnishment, execution or otherwise, and, in case of bankruptcy, the benefits shall not pass to or through any trustees or other persons acting on behalf of creditors: Provided, That this section shall not prohibit the use of any remedy provided by law insofar as the collection of obligations incurred for necessaries furnished to the recipient of such benefits or his dependents during the time when such individual was unemployed is concerned.

We first find that the trial court did not rule that the spousal support award had to be paid from defendant's unemployment benefits. To the contrary, the court imputed income to defendant based on his prior earnings, essentially finding that defendant could resume working if he chose and pay spousal support from those earnings. It does not appear that the trial court even took into consideration the amount of the unemployment benefits in setting the spousal support award. Additionally, nothing in MCL 421.30 precludes mere consideration of unemployment benefits in examining income for purposes of calculating spousal support. And MCL 552.602(m)(*ii*), which is part of the Support and Parenting Time Enforcement Act (SPTEA), MCL 552.601 *et seq.*, and covers spousal and child support, defines "income" as including "unemployment compensation." [2] Defendant's reliance on *Lapeer Co Dept of Social Servs v Harris*, 182 Mich App 686; 453 NW2d 272 (1990), and *Gonzalez v Gonzalez*, 121 Mich App 289; 328 NW2d 365 (1982), is misplaced. These cases are distinguishable because here the court concluded that defendant had the means to acquire income other than the unemployment compensation, the unemployment benefits played no role in the court's award decision, there is no indication in the record that unemployment benefits have actually been withheld to pay the spousal support, and unemployment benefits fit the definition of "income" under the SPTEA. In *Lapeer Co* and *Gonzales*, ADC benefits and general assistance payments were at issue, not unemployment benefits, and those benefits are not included under the definition of "income" in MCL 552.602(m), which fact was expressly noted by the *Lapeer Co* panel. *Lapeer*, 182 Mich App at 690-691; *Gonzalez*, 121 Mich App at 291-292. Reversal is unwarranted.

Finally, defendant argues that the trial court erred by failing to provide any mechanism for modification of its spousal support award due to a change of circumstances. The spousal support provision in the judgment of divorce stated that the monthly award shall be paid "for an indefinite time period." This language does not render the support award nonmodifiable; an

[2] Given the circumstances of this case, we find it unnecessary to determine whether MCL 421.30 would preclude an order of income withholding relative to unemployment benefits or whether the SPTEA, and specifically MCL 552.604, governs by allowing such a withholding.

indefinite time period could be six months or twenty years, thereby indicating that the award is susceptible to being modified. At most, it perhaps arguably creates an ambiguity. However, even then, by statute and caselaw, the provision can *only* be interpreted as calling for modifiable spousal support, given that the award was entered by the trial court after a trial in which spousal support was disputed, not pursuant to a settlement agreement. MCL 552.28 provides in relevant part:

> On petition of either party, after a judgment for alimony . . ., the court may revise and alter the judgment, respecting the amount or payment of the alimony . . ., and may make any judgment respecting any of the matters that the court might have made in the original action.

In *Staple v Staple*, 241 Mich App 562, 569; 616 NW2d 219 (2000), this Court stated that MCL 552.28 "will always apply to any alimony arrangement adjudicated by the trial court when the parties are unable to reach their own agreement." In *Gates v Gates*, 256 Mich App 420, 433; 664 NW2d 231 (2003), this Court explained:

> Thus, under both *Staple*, *supra*, and MCL 552.28, because the spousal-support provision of the divorce judgment resulted from the trial court's disposition rather than agreement of the parties, the judgment may not be interpreted to preclude defendant from seeking to continue spousal support, or, in other words, modify the spousal support award[.]

And in *Rickner v Frederick*, 459 Mich 371, 379; 590 NW2d 288 (1999), our Supreme Court, construing MCL 552.28, emphasized that "the statutory power to modify [spousal support] is not dependent on triggering language in the judgment."

Here, whether by the words of the spousal support provision, or by operation of law, the award of spousal support is modifiable, and the judgment of divorce shall be construed in such a manner. Defendant is free to move for a reduction or elimination of spousal support in the future consistent with applicable law.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens